No. 15,036

In The

United States Court of Appeals For the Ninth Circuit

PHILIP CARL ORNELAS,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLEE'S ANSWERING BRIEF

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STATEMENT OF THE CASE

A jury returned a verdict finding appellant guilty of murder in the second degree upon the following indictment:

> "THE GRAND JURY CHARGES:
>
> That on or about February 12, 1954, at the Reno Indian Colony, within Indian country, near the easterly limits of the City of Reno, County of Washoe, State and District of Nevada, and within the jurisdiction of this Court, PHILIP CARL ORNELAS, alias Phillip Carl Molina, defendant above-named, he being then and there an Indian, did, with malice aforethought, but without premeditation, murder one Daisy Morgan, she then and there being another Indian, in violation of Section 1153, Title 18, United States Code."

To better understand the position asserted by appellant, it becomes necessary to review the record of the proceedings in the District Court.

Case No. 12,651

March 31, 1954—The appellant waived prosecution by indictment, and an information, in the language of the indictment aforesaid, was filed by the United States Attorney. (R. pg. 3).

April 5, 1954—Upon motion of the United States Attorney, Case No. 12,651 was dismissed by order of the court. (R. pg. 5).

Case No. 12,656

April 2, 1954—The indictment set out aforesaid, returned by the Grand Jury, was filed with the clerk. (R. pg. 4).

April 5, 1954—The appellant was arraigned and entered a plea of guilty to the indictment. (R. pg. 5).

April 21, 1954—Upon motion by appellant, the Court ordered that the plea of guily entered by the appellant be vacated and set aside. The appellant then entered a plea of "not guilty" to the indictment. (R. pg. 6).

June 17, 1954—Following a trial which commenced June 14, 1954, the jury returned a verdict finding appellant guilty of murder in the second degree. (R. pg. 10).

July 26, 1954—Appellant was sentenced to life imprisonment. (R. pg. 11).

May 16, 1955—Appellant filed his motion to vacate and set aside judgment and sentence, under the provisions of Title 28, U.S.C., Sec. 2255. (R. pg. 14).

December 16, 1955—Opinion and order of the Court denying appellant's motion to vacate and set aside judgment and sentence was filed. (R. pg. 34).

The appellant now appeals from the order denying his motion to vacate and set aside judgment and sentence. (R. pg. 48).

ARGUMENT

1. The assignment of error by appellant can best be answered by quoting excerpts from the opinion filed in the District Court by the Honorable Roger T. Foley in the denial of appellant's motion:

> "The questions raised by the defandant's motion were matters of law except the allegations that perjury was involved in the proceedings as follows:
>
> "1. Perjury was knowingly used by the United States Attorney to secure the conviction;
>
> "2. That the Probation Officer committed perjury in narrating the circumstances surrounding the killing of deceased; and
>
> "3. Alleged perjury by the arresting officer concerning details of defendant's arrest.
>
> "The jury passed upon the credibility of witnesses in arriving at their verdict and the Trial Judge is satisfied from his determination of the credibility of the witnesses that the charges of perjury are unfounded. Therefore, as to the alleged factual matters, the Court is of the opinion that the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief by virtue of his charges above referred to.

"In the brief of defendant's counsel it is urged that the sentence was "imposed in violation of the Constitution of the United States and is otherwise subject to collateral attack." Defendant complains that the Trial Court, 'throughout the trial and in its instructions to the jury, suffered the defendant to stand trial and held him to answer upon a charge of murder in the first degree' under an indictment charging no greater degree of homicide than that of second degree murder. It should be noted that in all of the cases cited in behalf of the defendant the points similar to those raised here were considered on appeals from the judgments rendered and not by way of motion to vacate sentence or habeas corpus. Defendant's motion comes in the absence of appeal and long after the time for appeal has elapsed.

"The indictment returned April 2, 1954, after the entitlement of the court and cause, is as follows:

'INDICTMENT FOR VIOLATION
SEC. 1153, T. 18, U.S.C.
SEC. 1111, T. 18, U.S.C.

'THE GRAND JURY CHARGES:

'That on or about February 12, 1954, at the Reno Indian Colony, within Indian Country, near the easterly limits of the City of Reno, County of Washoe, State and District of Nevada, and within the jurisdiction of this Court, Philip Carl Ornelas, alias Phillip Carl Molina, defendant above-named, he being then and there an Indian, did, with malice aforethought, but without premeditation, murder one Daisy Morgan, she then and there being another Indian, in violation of Section 1153, Title 18, United States Code. * * '

"It is to be assumed that the jury considered the evidence in the light of all the instructions given by the Court. From the instructions taken as a whole, the jury were informed that they could not possibly find the defendant guilty of murder of the first degree unless they

found from the evidence that the killing was done in the perpetration or attempt to perpetrate one or more of the felonies named in Sec. 1111 of Title 18, U.S.C.A. This is borne out by the following: Included in Instruction No. 3 defining murder, the Court stated:

> 'Murder in the second degree is the unlawful killing of a human being with malice aforethought but without premeditation and deliberation, and which was not committed in the perpetration of or attempt to perpetrate any arson, rape, burglary or robbery.'

"As the indictment expressly negatived the element of premeditation, the jury, considering the above with all the other instructions and particularly with reference to Instruction No. 4 informing the jury that every murder committed in the perpetration or attempt to perpetrate any rape is murder of the first degree, were given to understand that if they did not find beyond a reasonable doubt that the death of the victim was the result of a rape or attempt to perpetrate a rape upon her, they could not find the defendant guilty of murder of the first degree.

"The loathsome details of the crime as revealed by the evidence in this case would have supported a finding by the jury that the unfortunate victim came to her death by reason of a beating administered by the defendant in the perperation or attempt to perpetrate a rape upon her. Upon no other basis under the language of the indictment expressly negativing premeditation, and under the instructions of the Court and the evidence in the case, could the jury have returned a verdict of murder in the first degree. It would serve no good purpose to narrate here the sordid details disclosed by the evidence. Sufficient to show the character of the same would be the statement of the Court made at the time of imposition of sentence:

'There isn't much that I should say. I don't want to add to your sorrow or distress by any words that might seem to be a scolding or a lecture or anything of that kind, but you might carry away with you a thought that you are very fortunate, very fortunate that you are not standing here convicted of first degree murder. The evidence in this case, in my opinion, without any reasonable doubt, shows that you are guilty of murder of the first degree, you committed murder of the first degree. You committed murder in the first degree in attempt to perpetrate or in the perpetration of a rape. You committed murder of the first degree in a premeditated brutal killing of an old, innocent Indian woman, 73 or 74 years of age. You committed this crime without any sufficient provocation whatsoever. * * *'

"In the case of *State v. Munios,* 44 Nev. 353, 195 Pac. 806, the Supreme Court of Nevada, speaking through Justice Ducker, affirmed a conviction of murder in the first degree. The statutory provisions of the State of Nevada in relation to homicide from the earliest times and at the present day, with the exception to be here noted, were very similar to, if not identical with, the provisions of 18 U.S.C.A. Sec. 1111. Through some oversight, the anomaly referred to by Justice Ducker came into being in 1915 and expired in 1919, when the legislature restored to the statute the provision: 'That every wilful, deliberate, and premeditated killing shall be deemed murder of the first degree.' It will be noted this is substantially stated in the federal statute. The provision of the Nevada statute of 1915, insofar as we are concerned here, was:

'All murder which shall be perpetrated by means of poison, lying in wait, ...or which shall be committed in the perpetration, or attempt to perpetrate, any arson, rape, robbery, or burglary, * * * shall be deemed murder of the first degree; and all other

kinds of murder shall be deemed murder of the second degree.'

"The legislature of 1919 filled the blank appearing above by inserting words to the effect that 'every wilful, deliberate and premeditated killing * *' Speaking of what he called an anomaly, Justice Ducker said: (Page 356 of 44 Nev.)

'This strange, unnatural legislative creature came into being in 1915 and expired in 1919, "unwept, unhonored and unsung" except by the few, who, through the medium of its dispensing power, went unwhipped of public justice. We seriously question the power thus exercised, withdrawing in a large measure that security of life, guaranteed to the people of this state by the organic law of the land. The legislature of 1919 restored to the statute the provision that every wilful, deliberate, and premeditated killing shall be deemed murder in the first degree, and we must believe that the omission was either inadvertant, or its effect not fully appreciated.

" 'Murder is the unlawful killing of a human being, with malice aforethought, either express or implied. The unlawful killing may be effected by any of the various means by which death may be occasioned." See section 119 of "An act concerning crimes and punishment". (Rev. Laws, 6384 (now Sec. 1066 N.C.L. 1929)).'

"Here it should be emphasized that the definition of murder contained in the Nevada statute is identical with that of 18 U.S.C.A. Sec. 1111. Now, continuing to quote from *State v. Munios* (Page 357)

'By section 201 of the Criminal Practice Act (Rev. Laws, 7051 (now Sec. 10849 N.C.L. 1929)) the following form is provided:

' "The State of Nevada, plaintiff(against....., defendant. * * * Above named is accused by the Grand

jury * * * of a felony (or the crime of murder * * *), committed as follows: The said....., on the..... day of....., A.D. 19....., or thereabouts, at the county of....., State of Nevada, without authority of law and with malice aforethought, killed....., by shooting with a pistol. * * *''

'It is well settled that an indictment charging murder in the form prescribed will support a verdict of murder of the first degree. *State v. Millain,* 3 Nev. 409; *State v. Thompson,* 12 Nev. 140; *State v. Hing,* 16 Nev. 307; *State v. Wong Fun,* 22 Nev. 336, 40 Pac. 95.

'The indictment in the instant case, therefore, would have been sufficient to support a verdict of murder of the first degree before the amendment in 1915 * * * dividing murder into two degrees, by which the provision ''any other kind of wilful, deliberate and premeditated killing'' was omitted from the statute. If it would have been sufficient then, it certainly was not insufficient at the time the appellant is charged to have committed the crime for which he stands convicted, for the amendment did not alter or affect the statutory definition of murder. It simply limited the cases of first-degree murder, to those special instances designated in the statute.

'The general definition of murder in the statute includes both degrees, the same as at common law it included all cases of felonious homicide, not only where the murder was perpetrated by means of poison, or lying in wait, or torture, or by any other kind of wilful, deliberate, and premeditated killing, etc., but also those cases where the killing was not characterized by any particular atrocity, or by deliberation or premeditation. *State v. Thompson,* 12 Nev. 140.

'But it is urged that the provision which makes all other kinds of murder, except those designated murder of the second degree, does away with the common law

and leaves murder of the first degree an offense particularly described by the statute, and embodies certain characteristic elements which must be pleaded in the indictment.'

"On the same page, Justice Ducker went on to say:

'In Ex Parte Dela, 25 Nev. 353, 60 Pac. 220, 83 Am.St.Rep. 603, this court said:

' "It was not necessary at Common law to even charge that murder was committed in the perpetration of another crime, and it was sufficient to charge it in the common form; and, upon proof that the crime was committed in the perpetration of another crime, such proof stood in lieu of the proof of malice aforethought." '

'The use of poison in the commission of the crime of murder, or by lying in wait, etc., its commission in the perpetration or attempting to perpetrate any of the felonies enumerated in the statute, are merely circumstances of aggravation, which, in the law, amount to, or are the equivalent of, premeditation.

'In alleging other forms of murder it was never necessary in this jurisdiction to charge deliberation or premeditation. Upon principle, then, why was it necesary, under the amendment in 1915, to allege the equivalent in order to charge murder of the first degree? We hold that it was not, and that the indictment is sufficient to support the verdict.

'The decisions cited by counsel for appellant to sustain his contention and holding in effect that an indictment charging homicide without charging a premeditated design, or lying in wait, torture, etc., will not support a conviction of murder of the first degree, are opposed to the great weight of authority, and contrary to the principle enunciated in *State v. Thompson*, supra.'

'Where the homicide is committed in the perpetration of or attempt to perpetrate a felony, or in the wtihdrawal or escape therefrom, although there is authority which holds it necessary to set out in the indictment or information the felony in the pursuance of which the homicide was committed as well as the homicide, it is usually held that an indictment in the ordinary form for murder or for murder in the first degree is sufficient without averment of the connected felony. Hence allegations as to the connected offense may be disregarded, where the remaining averments are sufficient to charge murder or murder in the first degree in the usual form, and in any event are to be deemed sufficient if accused is not misled or prejudiced.'

—40 C.J.S. 1038, Sec. 148, Homicide.

"In *State v. Wong Fun,* 22 Nev. 336, 340, the charging part of the indictment was as follows:

'The said George Fong, on the 4th day of October, A.D. 1894, or thereabouts, without authority of law, and with malice aforethought killed one Hing Lee, a human being, by shooting him.'

"The Supreme Court of Nevada went on to say:

'Under our statute dividing murder into two degrees, and the one providing a form of indictment, this indictment is sufficient to support a verdict of murder in the first degree, although it does not charge that the killing was done with premeditation and deliberation. Citing Nevada cases.

'Premeditation or malice aforethought is an essential ingredient of the offense of murder. "Malice aforethought" or "malice prepense," which are the terms usually applied to the malice requisite in murder, is malice existing before the killing and acting as a cause of the killing. The term "malice afore-

thought'' imports premeditation, and has been held to involve deliberation, * * *.'

—40 C.J. S. 861, Sec. 15, Homicide.

'Premeditation or malice aforethought is a necessary ingredient of murder.'

—*People v. Erno* (Cal.), 232 Pac. 710, Syll. 7 and 9.

''As we have seen, the indictment here alleged that the killing was done with malice aforethought but without premeditation. From the quotations above we see that the terms 'premeditation' and 'malice aforethought,' by the usual definitions, are synonymous.

''The defendant's contention that the indictment here does not include a charge of first degree murder is based entirely upon the clause 'but without premeditation.' Counsel's theory may be derived from their reading of the forms of indictment for first degree murder to be found in the appendix of forms following the Federal Rules of Criminal Procedure, which forms, it may be noted, are merely illustrative and not mandatory. Rule 58, Fed. Rules Crim. Proc., 18 U.S.C.A. If, in the use of either of those forms the words 'with premeditation' did not appear in the indictment but were replaced with the words 'without premeditation,' there would be no allegation in such an indictment of the essential element of murder of the first degree, there would be no allegation of the unlawful killing of a human being with malice aforethought. Here there is, it being averred in the indictment that 'defendant * * * did, with malice aforethought * * *.' The words 'malice aforethought' import premeditation.

''If any meaning is to be given to the action of the pleader here with using in the indictment the terms 'with malice aforethought' and following the same with the clause 'but without premeditation,' it can only be considered as an attempt upon the part of the pleader to

eliminate from the case but one of the categories of first degree murder defined by Sec. 1111, 18 U.S.C.A., viz: "or any other kind of wilful, deliberate, malicious, and premeditated killing; * * *.' Under an indictment as here, any revelant evidence that the murder was committed in the perpetration or attempt to perpetrate any of the named felonies could be received.

"The United States Court of Appeals, District of Columbia, in *Burton v. United States,* 151 F.2d 17, makes it plain, when considered with other cases cited in this Opinion, that under an indictment in the common law form for murder in the first degree, the prosecution may prove facts to bring the case within any of the provisions of the statute defining murder in the first degree. In the opinion it was there stated:

'Appellant was convicted of murder in the second degree. The indictment charged murder in the first degree—a killing with deliberate and premeditated malice.

'(1,2) The first ground of appeal is an instruction given that the jury might return a verdict of murder in the first degree if they believed that the killing was committed while appellant was engaged in robbery. The court then defined the crime of robbery. It is argued that this instruction was improper because robbery was not charged in the indictment. There is no merit to this contention. The perpetration of a robbery, during which act a homicide is committed, legally takes the place of that premeditation to kill which is necessary for murder in the first degree. And, "under an indictment in the common law form the prosecution may prove facts to bring the case within any of the provisions of the statute defining murder in the first degree." It was held in *State v. McGinnis* (59 S.W. 83, No.) that it is proper, under an indictment which simply charges murder, to instruct the jury that, if the homicide was committed in an at-

tempt to commit robbery, the defendant was guilty of murder in the first degree. And it is not error to give such instruction because the indictment tendered no such issue as robbery.'

"In the conduct of the trial the court did not enlarge nor attempt to enlarge the scope of the indictment."

2. Assuming, arguendo, that the indictment charges second degree murder, the appellant is not entitled to any relief by reason of his motion.

It has been held that a motion to vacate under Title 28, Section 2255, U. S. C. is not available, in lieu of appeal, to correct trial errors even though constitutional questions are involved.

In the case of *United States v. Walker,* 197 F.2d 287 (CA 2d, 1952), (Certiorari denied, 344 U.S. 877), defendant's motion under 28 U.S.C.A., S. 2255, for vacation of judgment and discharge from imprisonment, was grounded on the premise that his conviction resulted from evidence procured from him while he was held in illegal custody under a warrant of arrest which he originally assumed to be valid but now claims to have been void by reason of facts which were later discovered.

The circuit court in affirming the district court's denial of the motion said (at page 288):

"Assuming that the evidence could have been suppressed by proper motions before or during the trial, it is extremely doubtful that objection to the evidence can be raised at this late date by motion under 28 U.S.C.A., S. 2255. Such a motion cannot ordinarily be used in lieu of appeal to correct errors committed in the course of a trial, even though such errors relate

to constitutional rights. (Citing *Howell v. U.S.,* 4th Cir., 172 F.2d, 213, certiorari denied 337 U. S. 906: 'It is elementary that neither habeas corpus nor motion in the nature of application for a writ of error coram nobis can be availed of in lieu of writ of error or appeal, to correct errors committed in the course of trial, even though such errors relate to constitutional rights. It is only where there has been the denial of the substance of a fair trial that the validity of the proceedings may be thus collaterally attacked or questioned by motion in the nature of petition for writ of error coram nobis or under 28 U.S.C.A., S. 2255.')"

In the case of *United States v. Jonikas,* 197 F.2d 675 (CA 7th, 1952), Certiorari denied 344 U. S. 877, the court reviews this proposition and states at page 676:

"The purpose of the proceeding provided for by 28 U.S.C.A. par. 2255 is to give the prisoner a method for a direct attack on his sentence in the court in which he was tried and sentenced; but to attack the sentence successfully in such a proceeding the prisoner must have grounds which would support a collateral attack on the sentence. Mere errors of law occurring in the trial which could be corrected by an appeal, cannot serve as grounds for an attack on the sentence under par. 2255.

"In *Pullian v. United States,* 10 Cir., 178 F.2d 777, a prisoner tried to vacate his sentence on the ground that the indictment had been deficient. There the court said, 178 F.2d at page 778:

'Section 2255, supra, does not give a prisoner the right to obtain a review, first by the court which imposed the sentence and then on appeal from a denial of a motion to vacate, of errors of fact or law that must be raised by timely appeal. * * * While the nature of the attack is direct, the grounds therefor are limited to matters that may be raised by collateral attack. It is only where the judgment was

rendered without jurisdiction, the sentence imposed was not authorized by law, or there was such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack that a motion to vacate will lie under such section.'

"In *Taylor v. United States,* 4 Cir., 177 F.2d 194, 195, the court said:

'Prisoners adjudged guilty of crime should understand that 28 U.S.C.A., par. 2255 does not give them the right to try over again the cases in which they have been adjudged guilty. Questions as to the sufficiency of the evidence or involving errors either of law or of fact must be raised by timely appeal from the sentence if the petitioner desires to raise them. Only where the sentence is void or otherwise subject to collateral attack may the attack be made by motion under 28 U.S.C.A., S. 2255, which was enacted to take the place of habeas corpus in such cases and was intended to confer no broader right of attack than might have been made in its absence by habeas corpus.'

"In *Hastings v. United States,* 9 Cir., 184 F.2d 939, the court denied such a motion which alleged insufficiency of evidence and the giving of an erroneous instruction. The court there affirmed the decision of the trial court denying the motion, saying, 184 F.2d at page 940:

'There was no appeal from the judgment of conviction and what appellants seek in this Sec. 2255 proceeding is a retrial of their case.' "

The case of *United States v. Haywood,* 208 F.2d 156 (CA 7th, 1953) again restates the general rule as follows, page 158):

"Of course it is not a technicality, but a well established rule of law, that mere errors of law occurring at the trial, which could be corrected upon an appeal,

cannot serve as the basis of attacking the judgment of conviction under Sec. 2255. *United States v. Jonikas,* 7 Cir., 197 F.2d 675, 676. A motion under Sec. 2255 cannot ordinarily be used in lieu of an appeal to correct errors committed in the course of a trial even though such errors relate to constitutional rights. *United States v. Walker,* 2 Cir., 197 F.2d 287, 288; *United States v. Rosenberg,* 2 Cir., 200 F.2d 666, 668 . ."

In the decision of *Smith v. United States,* 187 F.2d 192 (CA. D. C. - 1950), the court, at page 197, states:

"We referred with apparent approval in *Meyers v. United States,* Supra, (86 U.S. App. D. C. 320, 181 F.2d 803), to the statement therein attributed to Judge Holtzoff, D. C., 84 F. Supp. 766, that errors committed during a trial may not be reviewed by habeas corpus unless involving jurisdiction of the court or 'deprivation of constitutional rights amounting to a denial of the essence of a fair trial, . . .' This we think is a fair statement of the principle to be applied as we read the lesson of the decisions of the Supreme Court."

And at page 198:

"* * * Appellant had full opportunity to attack on his trial the evidence now challenged and to appeal on the basis of its erroneous admission if he so desired."

The Fifth Circuit, in the case of *Bowen v. United States* 192 F.2d 515 (CA 5th - 1951), has ruled as follows (at page 517):

"After all, while it is of the essence of the constitutional principles which mark and distinguish our system: that trials be conducted according to law; that in short, the government be obliged to control itself; and that when one had been convicted in violation of those principles he should be accorded relief; it is also

of the essence: that the government be enabled to control the governed and to that end that judgments have finality; and that trials, conducted in accordance with law and ending in conviction, some day be at an end. Especially is it of the essence of orderly trials that the right to counsel accorded to defendants by the constitution be not regarded, as the argument here would seem to regard it, as a mere one way street such that, if the strategy and tactics of his trial counsel, in determining not to raise constitutional questions, prove unsuccessful, defendant, without appealing from the judgment, may many years later set it aside in order that, on another trial with another counsel, another course raising these questions may be taken, and so on ad infinitum."

3. The authority cited by appellant in support of his notion stemmed from direct appeals taken after conviction, nd none involved collateral motions to vacate judgment.

Neither a habeas corpus action, or a motion to vacate a dgment is a substitute for a direct appeal. The annotaons under 28 U.S.C., Sec. 2255 abound with supporting tations of this proposition.

4. A motion to vacate the judgment is ineffective unless can be shown that if granted, and followed by retrial, e result would be different from that presently obtaining.

The case of *United States v. Moore*, 166 F.2d 102 (CA h - 1948) holds as follows (at page 104):

"We take it that there can be no question but that when it is sought to set aside or vacate a judgment whether by complaint in equity or by way of coram nobis or its modern equivalent, a motion to vacate, such as we have before us, no relief can be granted

unless it appears that a retrial will result in a judgment different from the one sought to be vacated and that, in the absence of such a showing, the judgment will not be set aside. The reason for this rule is that if defendant has no valid defense, so that a second trial must result in an identical judgment, then no actual injury has occurred and it would be a vain and idle thing to set aside the judgment already entered. As a corollary, it is not sufficient to aver merely, in general terms, that defendant has a good and meritorious defense but the nature of that defense, the facts constituting it, must be set forth in such detail as to enable the court to determine whether it is meritorious and sufficient." (Citing cases).

* * * * *

"Inasmuch as petitioner makes no averment that he is innocent, or that he has any defense of any character to the charge to which he has previously pleaded guilty, he has not made out a case for relief. He does not claim that if he had been permitted to interpose a defense, with proper representation of counsel, the judgment could have been any other than what it was. He denies in no way the charge upon which he was convicted and makes no suggestions of any defense in whole or in part."

In *United States v. Bremer,* 207 F.2d 247 (CA 9th, 1953), the court cites with approval the correctness of the principle stated in *United States v. Moore,* supra.

Appellant's motion puts forth no claim of defendant's innocence, nor is there any contention that a retrial would bring a different degree of conviction or result in a different punishment. Appellant was convicted of second degree murder and received the maximum punishment authorized for that offense. He does not now contend that upon retrial he might be convicted of a lesser offense.

CONCLUSION

It is contended that the appellant was fairly and justly convicted of the offense charged in the indictment, and that the order denying appellant's motion be affirmed.

Respectfully submitted,

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Dated: May 3, 1956.